



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider the Adoption of a
General Order and Procedures to Implement the Digital
Infrastructure and Video Competition Act of 2006.

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**REPLY COMMENTS OF THE GREENLINING INSTITUTE ON THE OPINION RESOLVING
ISSUES IN PHASE II**

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I. INTRODUCTION

The Greenlining Institute (“Greenlining”) respectfully submits the following reply comments to the California Public Utilities Commission (“Commission” or “CPUC”) in response to the Opinion Resolving Issues in Phase II of this proceeding for the implementation of the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA” or “the Act”).

**II. THE BENCHMARKS AND STANDARDS FOR COMPLIANCE WITH DIVCA’S BUILD-
OUT AND NON-DISCRIMINATION PROVISIONS ARE REASONABLE AND EFFICIENT**

**A. APPLICATION OF LARGE CARRIER BENCHMARKS TO SMALL CARRIERS
FURTHERS DIVCA’S INTENT WITHOUT IMPOSING AN UNDUE BURDEN ON THE
CARRIERS.**

Cal. Pub. Util. Code §5890(e) describes the build-out benchmarks with which franchise holders with more than one million telephone customers must comply. Franchise holders with fewer than one million telephone customers are subject to Cal. Pub. Util. Code §5890(c), which merely states that service must be built out “within a reasonable time, as determined by the commission.” The Commission, in the Proposed Decision (“PD”), has determined that the standard for a reasonable time for a small franchise holder’s build-out shall be determined by the same benchmarks as are applied in §5890(e) to large carriers.¹ As stated in its Opening Comments, the PD strikes the proper balance between providing California consumers with increased access to technology and protections for smaller franchise holders from undue compliance burdens.² §5890(c) allows small carriers to petition for exemption from the benchmarks if compliance would be substantially more costly than the average cost of providing video service in the telephone service area in question. GO 169 also allows small carriers to satisfy company-specific build-out plans approved by the Commission.³

¹ Proposed Decision, p. 14.

² Greenlining Opening Comments, p. 2.

³ General Order 169, § VI(B)(1)(3), p. 11.

This permits a small carrier to petition for more time to comply with the Commission's build-out standards. These provisions together provide ample opportunity for small franchise holders to fulfill their commitments under DIVCA, but in a manner that does not jeopardize the health of their businesses.

In addition to general build-out requirements, DIVCA also requires that expansion be undertaken in a manner that does not discriminate against low-income consumers.⁴ Greenlining supports the PD's extension of the existing non-discrimination benchmarks from §5890(b) to small franchise holders⁵, as this provides the Commission a *measurable* standard for determining whether small franchise holders are in compliance with their obligations and is an significant step toward meeting DIVCA's mandate of closing the digital divide.

(1) THE COMMISSION NEEDS A STANDARD BY WHICH IT CAN DETERMINE WHETHER A SMALL CARRIER'S BUILD-OUT IS REASONABLE

The Small LECs contend that the specific non-discrimination benchmarks contained in §5890(b) were specifically negotiated with the larger service providers during DIVCA's drafting process, and were never intended to apply to smaller carriers.⁶ While it may be true that these specific standards were negotiated to apply to the larger franchise holders, this is not a persuasive reason for not applying them to smaller franchise holders as well. The Commission needs a way to determine whether small franchise holders are in compliance with § 5890(a)'s general non-discrimination provision. Without any guiding standards, the Commission's process of reviewing compliance with § 5890(a) runs the risk of being inconsistent and unduly time-consuming. Only with standards can the Commission easily determine whether a franchise holder is in compliance.⁷

The PD acknowledges the concern raised DRA that small franchise holders will be unable to comply with the non-discrimination benchmarks because of the income demographics in their particular service territories and provides an alternate mechanism for franchise holders serving relatively few low-income households to remain in compliance with DIVCA's non-discrimination provisions.⁸ Even so, the Small LECs contend that even this relaxed benchmark will be too difficult to meet.⁹

⁴ All state franchise holders are subject to Cal. Pub. Util. Code §5890(a), which generally prohibits franchise holders from discriminating against consumers in low-income communities. Furthermore, franchise holders serving more than one million telephone customers are held to specific low-income access benchmarks under § 5890(b).

⁵ Proposed Decision, p. 14-15.

⁶ They argue that the Commission has ample resources for enforcing small franchise holder compliance with § 5890(a) without extending benchmarks that were intended to apply only to larger carriers. *See* Opening Comments of the Small LECs on the Proposed Decision, p. 2-4.

⁷ For example, the Commission only needs to conduct an in-depth review of a franchise holder's build-out into low-income communities for those holders who have not reached the benchmarks. This streamlines the Commission's enforcement responsibilities while ensuring that consumers in all franchise holders' service territories will have comparable access to video service.

⁸ Proposed Decision, p. 15-16.

⁹ Opening Comments of the Small LECs on the Proposed Decision, p. 6.

Greenlining strongly recommends that the Commission reject this contention and adopt the PD's application of §5890(b)'s non-discrimination benchmarks. Should a small franchise holder find itself in the situation posed by the Small LECs, the Commission can always choose to allow the holder to demonstrate, by petition that, it is building out in low-income communities in a reasonable manner given its service territory and resources. While the PD clarifies that there is no extension available for compliance with the general non-discrimination provision contained in §5890(a), there is no indication either in GO 169 or in the PD that small carriers who demonstrate a legitimate need will not be permitted to take extra time, commensurate with demonstrated need, to comply with the benchmarks. This system will ensure that franchise holders who *are* able to make aggressive progress toward DIVCA's non-discrimination goals do so, yet will accommodate the needs of franchise holders who are less capable of such progress.

(2) FRANCHISE HOLDERS BUILDING OUT UNDER INDIVIDUALLY-APPROVED PLANS SHOULD BE HELD TO A RIGOROUS STANDARD OF PROOF WHEN APPLYING FOR AN EXTENSION

Greenlining agrees with California Community Technology Policy Group and the Latino Issues Forum ("CCTPG/LIF") that franchise holders following individual build-out plans under GO 169 §VI(B)(1)(3) should be viewed with disfavor if they apply for an extension under § 5890(f).¹⁰ The Commission should ensure that such franchise holders do not unduly delay their build-out. Greenlining also agrees with CCTPG/LIF that the approval process for an extension filed by a franchise holder following an individual build-out plan should be within a Commission proceeding with opportunity for public participation.¹¹

(3) THE COMMISSION SHOULD REVIEW EACH HOLDER'S FRANCHISE AREA TO ENSURE THAT IT IS DRAWN IN A NON-DISCRIMINATORY MANNER

Greenlining agrees with California Cable & Telecommunications Association's position that franchise holders could conceivably self-define their franchise areas to exclude low-income households and attempt to evade the Commission's non-discrimination requirements.¹² Greenlining respectfully urges the Commission to be cognizant of this possibility when assessing compliance with DIVCA's non-discrimination provision to ensure that: 1) the appropriate percentage of low-income households are being served and 2) the franchise areas are drawn according to legitimate factors, not excluding communities that may be more difficult to serve.

¹⁰ Opening Comments of CCTPG/LIF on the Proposed Decision, p. 1.

¹¹ Id.

¹² Opening Comments of CCTA on the Proposed Decision, p. 2, fn. 1.

(4) THE COMMISSION IS JUSTIFIED IN REQUIRING ADVANCE APPROVAL OF INDIVIDUAL BUILD-OUT PLANS

The Small LECs argue that requiring advance approval of build-out plans for carriers that cannot meet the build-out benchmarks constitutes an unduly onerous burden on small franchise holders, and that the Commission is not empowered to require advance approval.¹³ Greenlining does not believe this is the proper role for the Commission under DIVCA. Rather, the Commission should strive for the most efficient process possible, with the benefit of consumers as its first priority. Greenlining submits that reserving build-out approval for enforcement actions against individual non-compliant franchise holders harms consumers by allowing franchise holders to delay their compliance until they get caught “red-handed.” It also shifts the burden of compliance from the carriers, who are benefiting from the streamlined system, to the C. Greenlining believes such a shift would be inefficient and improper.

Given DIVCA’s fundamental goal to increase video and broadband service statewide, Greenlining submits that the Commission must set benchmark standards which all carriers must strive to meet. Small carriers who wish to take advantage of DIVCA’s streamlined franchise system should not be permitted to: 1) define exemptions solely on their own terms, without Commission approval and 2) evade compliance with statewide standards *designed to benefit consumers* until the Commission investigates the carrier for non-compliance. Greenlining therefore recommends that the Commission adopt the proposed system of prior approval of individual carrier build-out plans.

(5) SEPARATE “SAFE HARBOR” STANDARDS FOR SMALLER FRANCHISE HOLDERS ARE UNNECESSARY AND INEFFICIENT

The Small LECs submit that relaxed safe harbor standards should be implemented for smaller franchise holders.¹⁴ However, Greenlining submits that the PD strikes the appropriate balance between encouraging build-out to serve consumers and acknowledging the resource constraints faced by small franchise holders. The PD recognizes that the necessary flexibility is built into the statute in the form of extended time to satisfy build-out standards and exemptions in the event that build-out is simply cost-prohibitive.¹⁵ Greenlining reiterates its support for the Commission’s decision to maintain consistent standards. Greenlining also notes that the Small LECs contend that the Commission has no authority to add provisions to existing legislation¹⁶,

¹³ Opening Comments of the Small LECs on the Proposed Decision, p. 8. They argue that the Commission has ample resources for enforcing small franchise holder compliance with § 5890(a) without extending benchmarks that were intended to apply only to larger carriers. See Opening Comments of SureWest on the Proposed Decision, p. 3. The Small LECs are essentially arguing that the Commission’s role should be as a playground monitor, waiting for signs of non-compliance before undertaking an investigation and corrective action.

¹⁴ The Small LECs argue that the legislature intended to reduce the burdens of build-out on smaller carriers, therefore relaxed standards are appropriate. See Opening Comments of the Small LECs on the Proposed Decision, p. 9.

¹⁵ Proposed Decision, p. 14.

¹⁶ Opening Comments of the Small LECs on the Proposed Decision, p. 3.

yet they argue that the Commission should do just that, by adding a provision that relaxes build-out standards for small franchise holders *in addition* to the existing provisions which allow them to apply for an extension or an outright exemption if circumstances warrant. The Small LECs simply cannot have it both ways. The Commission should reject the proposed second tier of build-out benchmarks as unnecessary and an impediment to expansion of video service access to consumers.

III. THE COMMISSION SHOULD EXPAND ITS REPORTING REQUIREMENTS TO ENSURE THAT DIVCA'S GOAL OF CLOSING THE DIGITAL DIVIDE IS FURTHERED

Greenlining submits that the Commission should empower itself with the tools it needs to ensure that DIVCA is actually meeting the goal of closing the digital divide in California. Greenlining does not believe the Legislature intended to create such a *proactive* consumer protection initiative without allowing the Commission mechanisms to ensure that the Act is actually achieving its intended effect.

(1) REPORTING ON SUBSCRIBERSHIP AND COST OF SERVICE WILL ILLUSTRATE WHETHER *AVAILABLE* SERVICE IS TRULY *ACCESSIBLE* TO LOW-INCOME HOUSEHOLDS

Greenlining reiterates its arguments regarding additional reporting requirements on subscribership and notes that CCTPG/LIF both support this position.¹⁷ The digital divide in California will simply not close unless video and broadband services are utilized, not just available, in all communities.

In contrast, Verizon believes that GO 169 already requires reporting on video subscribership on a franchise-wide basis, and contends that this aggregate information is sufficient.¹⁸ Verizon concludes the Commission does not need subscribership data by census tract to enforce this provision. Greenlining respectfully disagrees with Verizon and urges that if the Commission is to *actually* close the digital divide between low-income and higher-income communities, it must first know the difference in video service penetration between communities at varying income levels. This information is the *essential* first step in examining ways to make information technology, upon which modern life increasingly depends, affordable to low-income households. DIVCA, as it applies to all franchise holders operating in California, is the most efficient and complete means of obtaining this valuable information. A voluntary survey, as suggested by Verizon,¹⁹ will not generate complete information on subscribership statewide.

In order for the Commission to ensure that these services are truly accessible to all communities, in an economic and technical sense, it *must* know whether households in specific areas or at certain income levels are actually utilizing available services. For this reason, Greenlining recommends that the Commission

¹⁷ Opening Comments of CCTPG/LIF on the Proposed Decision, p. 3.

¹⁸ Verizon further notes that the non-discrimination provisions in § 5890(b) are all based on access, not subscribership.

¹⁹ Opening Comments of Verizon on the Proposed Decision, p. 2.

require reporting on subscribership by census tract. Greenlining also recommends that the Commission require reporting on the cost of video and broadband services by census tract, without exercising any control over pricing. Affordability is key to accessibility. If households are not taking advantage of available services, the Commission should be allowed to glean insight as to the reason for the under-utilization, in order to take steps to address it.

(2) REPORTING ON TECHNOLOGY OFFERED BY CENSUS TRACT WILL ENSURE THAT FRANCHISE HOLDERS DO NOT PROVIDE INFERIOR SERVICE TO LOW-INCOME COMMUNITIES

Greenlining supports TURN with respect to required reporting on technology by census tract²⁰ and believes the Commission should require data on upload and download speeds, in order to ensure that franchise holders are in compliance with § 5890(j)(4).²¹ DIVCA intends to close the digital divide by making comparable video and broadband service available to all California consumers regardless of income level. If the Commission does not take steps to ensure that the quality of service offered to low-income communities is *of equal quality* to that provided to more affluent communities it will only partially advance this goal. Allowing franchise holders to provide sub-par service to low-income communities will foster a second class of consumers who have access only to inferior service, while giving the appearance that the digital divide is closing. Therefore, Greenlining urges that reporting on technology deployed by census tract is essential to enforcing the non-discrimination provisions.

IV. CONCLUSION

Greenlining respectfully urges the Commission to consider and adopt the above recommendations, to ensure that DIVCA's goal of closing the digital divide can be achieved.

Dated: September 21, 2007

Respectfully submitted,

/s/ Robert Gnaizda
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/s/ Thalia N.C. Gonzalez
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²⁰ TURN notes that the Proposed Decision requires subscribership data for wireless broadband, and argues that the Commission should require the same data for other broadband technologies as well. Additionally, as TURN indicates, all wireless is not equal.

²¹ Opening Comments of TURN on the Proposed Decision, p. 2-4.

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CERTIFICATE OF SERVICE

I, Thalia N.C. Gonzalez, am 18 years of age or older and a non-party to the within proceeding. I am a resident and citizen of the State of California with the business address at the Greenlining Institute of 1918 University Avenue, Second Floor, Berkeley, CA 94704 and telephone number of 510-926-4002.

On September 21, 2007, I caused the following document:

**REPLY COMMENTS OF THE GREENLINING INSTITUTE ON THE OPINION RESOLVING
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to be served upon all interested parties of record in R.06-10-005 named in the official service list via e-mail to those whose e-mail address is listed in the official service list and via first class mail with postage prepaid or facsimile to those whose e-mail address is not available.

I certify that the foregoing is true and correct.

Executed in Berkeley, California on September 21, 2007.

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